C.F. SHARP & CO. (M) PTE. LTD.

v.

GRACE SHIPPING INC. & ANOR.

COURT OF APPEAL, SINGAPORE
WEE CHONG JIN CJ
T KULASEKARAM J
FA CHUA J
[CIVIL APPEAL NO. 84 OF 1980]
15 OCTOBER 1981

SHIPPING: *Shipping Law - Negotiations for charterparty - Whether agreement arrived at - Exchange of telexes - Standard form of charterparty - Whether ship's agents had authority to act.*

In this case the appellants were ship's agents and shipbrokers. They were instructed by the second respondents (Hai Nguam) to find vessels to carry fertiliser from Romania to Indonesia. One Hiswara of P.T. Bina Alam, an Indonesian firm, had agreed to buy the fertilizer from a Romanian Company but they had arranged with Phillips Petroleum International Inc. (Phillips) for Phillips to be the purchasers who would resell the fertiliser to P.T. Bina Alam. Hiswara instructed, unknown to each other, Phillips and Hai Nguam to find vessels for carrying the fertiliser. Phillips instructed Stott Neilson and Hai Nguam instructed the appellants. The appellants negotiated with the shipbrokers Polfracht to charter vessels in the belief that the charterers were Phillips. They conducted the negotiations by telex throughout using as the basis for negotiations the standard form of contract known as "Nuvoy Voyage Charter Party 1964". A charterparty was eventually prepared and signed by Polfracht as agents for the first respondent. This was sent to the appellants for signature by Phillips. The manager of Phillips refused to sign the charterparty. The first respondent sued Phillips for breach of contract and the appellants for damages for breach of warranty. Phillips' defence to the claim was that the appellants were not their agents and that they had no knowledge of the contract. The appellants' defence to the claim was that there was no concluded contract. They further denied that they held out Phillips as the intended charterers but if they did it was with the express or implied authority and consent of Phillips. The appellants joined the 2nd respondents as third parties. In their defence to the third party claim the 2nd respondents denied that they instructed or authorised the appellants to negotiate or make any contract for Phillips. The issues before the trial Judges were-

(i) Whether agreement was reached at the end of the negotiations between the appellants and Polfracht acting on behalf of the 1st respondent?

(ii) Whether in these negotiations the appellants professed to be acting on behalf of Phillips?

(iii) Whether the 2nd respondents instructed the appellants to act on behalf of Phillips?

(iv) Whether Phillips authorised the 2nd respondents to instruct the appellants to act on behalf of Phillips?

(v) What the measure of damages is?

Choor Singh J held on issue (1) that there was a concluded agreement. On issue (2) the learned Judge held that the appellants professed to be acting on behalf of Phillips and on issue (3) that the 2nd respondents did not instruct the appellants to act on behalf of Phillips.

On issue (4) the learned Judge held that Phillips did not authorise Hai Nguam to instruct the appellants to act on their behalf. The appellants appealed against the decision of the learned Judge on issues (1) and (3).

Held:

[1] The negotiations carried on by telexes between the appellants and Polfracht did not result in a concluded contract between Polfracht on behalf of the first respondent and the appellants on behalf of Phillips. Accordingly the appeal against the judgment in favour of the 1st respondent should be allowed.

[2] As it has been decided that there was no concluded contract entered into by the appellants on behalf of Phillips it is unnecessary to consider the appellants' appeal against the judgment of the learned Judge dismissing their claim for an indemnity against the 2nd respondents.

[3] However in the opinion of the Court, in this case the 2nd respondents, having regard to the course of dealings between them, had implicitly ratified the appellants' reply that Phillips were the charterers signing the charterparty.

For the appellants - G. Pollock QC; Godwin & Co.
For the 1st respondents - A. Leggatt QC; Drew & Napier
For the 2nd respondents - T.Q. Lim; M/s. T.Q. Lim

JUDGMENT

Wee Chong Jin CJ:

The appellants, C.F. Sharp & Company (Malaya) Private Limited (Sharp), are ship's agents and shipbrokers. They were instructed in January 1975 by the second respondents, Hai Nguan & Co. (Hai Nguan) to find vessels to carry triple phosphate sulphate, a fertiliser, from Rumania to Indonesia. Unknown to Sharp, Hai Nguan were acting on the instructions of a Mr. Hiswara of B.T. Bina Alam, an Indonesian firm. Hiswara had agreed to purchase 40,000 tons of the fertiliser from a Rumanian company but had arranged with Phillips Petroleum International Inc. (Phillips) for Phillips to be the purchaser who would re-sell the fertiliser to P.T. Bina Alam. By this arrangement Phillips would make a profit of US$80,000 although its part was that of a mere intermediary. Phillips was also asked by Hiswara to find vessels to carry the fertiliser to Indonesian ports for which they would receive a commission of 1.¼% of the charter fees.

The seeds for dispute had thus been planted by Hiswara by his instructing, unknown to each other, Phillips and Hai Nguan to find vessels for carrying the fertiliser. Phillips instructed shipbrokers Stott Nielson and Hai Nguan instructed Sharp. Sharp negotiated with shipbrokers Polfracht (Australiasia) Sydney Pty. (Polfrancht) to charter vessels in the belief that the charterers were Phillips. They conducted the negotiations with Polfracht by telex throughout. They sent two copies of all outgoing and incoming telexes to Hai Nguan as soon as the telexes were sent or received.

On 5 February 1975, through Stott Nielson and unknown to Sharp, the vessel "Montego" was chartered by P.T. Bina Alam to carry a shipment of 10,000 metric tons of the fertiliser. On that date several telexes were exchanged between Sharp and Polfracht as a result of which Polfrancht prepared for signature a charterparty using a standard form of charterparty called the "Nuvoy Voyage Charter Party 1964". Sharp and Polfracht dealt with each other in their telexes by reference to this standard form of charterparty and all their telexes were for the purpose of completing or adding to this printed form. The prepared charterparty was signed

by Polfracht as agents for Grace Shipping Inc. who are named in it as T/C (Time Charter) Owners. In the prepared charterparty the charterers were named as Phillips Petroleum International Inc.

The charterparty was then sent to Sharp for signature by Phillips. A meeting was arranged to take place on 8 February at the office of Mr. de Guzman, the manager of Phillips. At that meeting Mr. Hiswara, Mr. de Guzman, Mr. Windt, the assistant office manager of the Liner Department of Sharp, Mr. Tessensohn, the assistant to the managing director of Sharp, Mr. Lim Kuy Bak (Lim) a partner of Hai Nguan, and Mr. Eng Meng Kar, the assistant manager of Hai Nguan were present. Mr. de Guzman refused to sign the charterparty when asked by Mr. Windt to sign. Windt was shocked and turned to Lim for an explanation. Lim's answer was that he thought Phillips would be signing. The meeting broke up with the charterparty unsigned.

Subsequently several telexes were exchanged between Sharp and Polfracht to arrive at a mutually satisfactory arrangement. When this failed Grace Shipping Inc. (Grace Shipping), the first respondent in this appeal sued Phillips for damages for breach of contract and Sharp for damages for breach of warranty of authority. Grace Shipping claimed that a concluded contract had been made between them and Phillips on February 1975 the terms of which were contained in telexes exchanged between Polfracht on their behalf and Sharp on behalf of Phillips under which Grace Shipping as disponent owners of vessels to be nominated agreed with Phillips as charterers to carry four shipments of urea each of 11,000 metric tons ten percent more or less in owners' option from Constanza to Surabaya, Macassar or Belawan in Indonesia.

Phillips' defence to the claim was that Sharp were not their agents and that they had no knowledge of the alleged contract of affreightment. Sharp's defence to the claim was that there was no concluded contract as claimed by Grace Shipping. Sharp further denied that they held out Phillips as the intended charterers but if they did it was with the express or implied authority and consent of Phillips. Sharp also joined Hai Nguan as third parties in the suit claiming to be indemnified by Hai Nguan against the claim of Grace Shipping alleging that they were instructed by Hai Nguan to enter into negotiations for and to make a contract of affreightment for Phillips for the shipment of urea from Constanza to Indonesia. In their defence to the third party claim Hai Nguan denied that they instructed or authorised Sharp to negotiate or to make any contract of affreightment for Phillips.

The action was tried before Choor Singh J who said in his judgment that the issues to be decided were:

(1) Whether agreement was reached at the end of the negotiations between Sharp and Polfracht acting on behalf of Grace Shipping?

(2) Whether in those negotiations Sharp professed to be acting on behalf of Phillips?

(3) Whether Hai Nguan instructed Sharp to act on behalf of Phillips?

(4) Whether Phillips authorised Hai Nguan to instruct Sharp to act on behalf of Phillips?

(5) What the measure of damages is?

Choor Singh J held on issue (1) that there was a concluded agreement. On issue (2) the learned Judge held that Sharp professed to be acting on behalf of Phillips and on issue (3) that Hai Nguan did not instruct Sharp to act on behalf of Phillips. On issue (4) the learned Judge held that Phillips did not authorise Hai Nguan to instruct Sharp to act on their behalf. Sharp now appeals against the decision of Choor Singh J on issues (1) and (3).

Issue (1) Did the negotiations carried on by telexes between Sharp and Polfracht result in a concluded contract or not?

It is common ground that Sharp and Polfracht conducted their telex negotiations by reference to a standard form of charterparty known as "Nuvoy Voyage Charterparty 1964" and for the purpose of completing or adding to this standard form. It is contended on behalf of Sharp that in the present case for there to be a concluded agreement before the charterparty was signed the parties must have reached agreement on all those essential terms which are the minimum necessary to make a contract of this kind workable and must also have reached agreement on all those terms on which they in fact intended to agree on.

Sharp's case is that the telex negotiations did not result in a concluded contract because no agreement was reached on several terms which the parties either intended to agree on or which were necessary terms to make a contract of this kind workable. Sharp contend that the terms which were under negotiations and never agreed on relate to:

(1) who would appoint the vessel's agent at the loading and discharging ports;

(2) holiday time;

(3) arbitration and choice of law in the event of dispute; and

(4) nomination of first vessel.

Clause 8 of the Nuvoy Voyage Charterparty form deals with loading and Clause 8(i) as printed provides "vessel's agent appointed by ..." Clause 9(h) deals with discharging and Clause 9(1) as printed provides "vessel's agent appointed by ..." Polfracht, in the charterparty which they prepared on 5 February 1975, inserted the word "owners" in the blanks. The only telex dealing with Clause 8(i) and 9(h) came from Polfracht dated 29 January 1975 and it contains a "full counter" offer on behalf of Grace Shipping. Part of this telex said "owners agents both ends" which is a suggestion that Grace Shipping's agent should deal with the shipment at both loading and discharging ports. In their reply by telex dated 30 January 1975 Sharp made a counter-offer to Polfracht's "full counter" offer in which the suggestion that Grace Shipping's agent would be the vessel's agent at both the loading and discharging ports was not dealt with. With due respect to the learned trial Judge's finding, it is clear that no agreement was reached on this term. The question then is whether or not this term is an essential term in a contract of this kind or is a term which the parties in fact intended to agree on. The trial Judge did not deal with this point.

In the present case the parties were conducting negotiations by reference to the Nuvoy Voyage form of charterparty which contained clauses providing for agreement on who should appoint the vessel's agent at the loading and discharging ports. The contract was a substantial one involving the chartering of four vessels over long distances. In our judgment, upon the facts, the probabilities are that this was a term which the parties intended to agree on and without agreement on this term the parties had no idea of concluding any agreement.

The second point is on holiday time. The relevant clauses in the charterparty are Clause 8(c) and Clause 9(d). These sub-clauses both read as follows:

> Time from noon Saturday or (midnight on day preceding a legal holiday) to 8 a.m. Monday (or day after a legal holiday) to be treated as Sunday or holiday time.

It appears to be not in dispute that this is a term which is an essential term of a contract of this kind. The learned trial Judge accepted Grace Shipping's submission that Polfracht and Sharp had agreed on these two sub-clauses as set out in the prepared charterparty. It is contended on behalf of Sharp that this finding was clearly contrary to the evidence on this point because it is plain from all the relevant telexes that there was some confusion in that Sharp had made two inconsistent proposals which Polfracht had failed to notice and had merely picked one of the two proposals which they incorporated in the prepared charterparty.

The relevant telexes were transmitted between 4 and 5 February 1975. The first on 4 February was from Sharp and the relevant passage reads:

> Draft of loading port terms to be submitted to owners for their acceptance.
>
> ...
>
> (9) Time from noon Saturday till 8 a.m. Monday and from midnight on day preceding a holiday till 10 a.m. next working day not to count unless used.

Polfracht replied on 5 February to this as follows:

> Owners accept details listed yesterday except:
>
> ...
>
> AD9/To start to read: At loadport time from noon ... etc. Also second line to read = 7 a.m. = instead of = 10 a.m.

Thus Polfracht were counter offering that Clause 8(c) of the charterpary should be "Time from noon Saturday till 8 a.m. Monday and from midnight on day preceding a holiday till 7 a.m. next working day not to count unless used". Sharp replied to this later that day as follows:

> Hours of Saturday afternoon; agree your telex of 4 February point (9). Time from noon Saturday until 8 a.m. Monday and from midnight on a day preceding a holiday until 10 a.m. next working day not to count unless used.

It is plain from the times italicized (the italics are by us) in those three telexes that at that stage of the negotiations on holiday time at loading ports no agreement had been reached.

The parties in subsequent telexes merely agreed that the same hours applied for the discharging ports under Clause 9(d) of the charterparty. It is in our judgment plain that although Saturday to Monday time was agreed no agreement was reached on holiday time at the loading and discharging ports.

The third point is on the arbitration clause (Clause 14) in the charterparty. The prepared charterparty left this clause blank. On 6 February after the alleged concluded contract, Polfracht sent a telex suggesting the insertion of London saying that they would seek instructions from the owners and requesting Sharp to seek instructions from the charterers. On 8 February they sent another telex to Sharp stating that the owners had agreed to London and "if charterers accept this, please fill in line 88 (of the prepared charterparty) accordingly and confirm". Sharp replied several hours later as follows:

> We refer to your telex of the 6 February. Arbitration in London is agreed.

In our opinion, it is plain from these telexes, which came into existence after 5 February 1975, that the parties intended to agree on the place of arbitration and the law governing the contract but overlooked it earlier.

The fourth point relates to the nomination of the first vessel under the charterparty. Sharp's contention is that during the negotiations the charterers insisted on immediate nomination of the first vessel to perform the first shipment and Grace Shipping had not done so. The last telex of 5 February 1975 started as follows:

> Polfracht to Sharp:
>
> Pleased to advise you that contract finally reconfirmed as per charterers today's. Owners nominate for first voyage: Motor Steamer 'Ostrogozhsk' or substitute at owners' option.

This telex was in reply to Sharp's telex of the same date which stated that they disagreed with the proposed lay days for the first shipment and added that the charterers:

> insist (that they have the) name (of the) first vessel to-day 17.00 hours our time.

and adding that otherwise the buyers might cancel and that other vessels had been offered to the charterers.

In our opinion the inclusion of the right on the owners' part to substitute another vessel for the nominated vessel "Ostrogozhsk" had never been agreed by the charterers who were insisting on a named vessel and in the circumstances the telex on 5 February 1975 which nominated the "Ostrogozhsk" and which Grace Shipping plead as the concluding telex in the completion of the contract was plainly incapable of being a valid concluding telex. It is also plain from the evidence that Polfracht, knowing that there had to be a nomination of the first vessel at the time of the confirmation and not having got a vessel, attempted to deceive the charterers by nominating the "Ostrogozhsk" (which was not in a position to do the first voyage) "or substitute at owners' option". For a charterer, who has contracts to fulfil, the dates upon which he will be able to ship his goods and the dates upon which vessels will be available to be loaded and to carry the goods are normally of very great importance and in the present case the shipment and nomination dates were beyond doubt an essential part of the contract negotiations.

For all these reasons we are of the opinion that the negotiations carried on by telexes between Sharp and Polfracht did not result in a concluded contract between Polfracht on behalf of Grace Shipping, the first respondent in this appeal and C.F. Sharp & Company (Malaya) Private Limited, the appellants in this appeal, on behalf of Phillips Petroleum International Inc. Accordingly, the appeal against the judgment in favour of the first respondents is allowed with costs here and below.

Issue (3) - Whether Hai Nguan instructed Sharp to act on behalf of Phillips.

As we have decided that there was no concluded contract entered into by Sharp on behalf of Phillips, it is unnecessary to consider Sharp's appeal against the judgment of Choor Singh J dismissing their claim for an indemnity against Hai Nguan, the Third Parties. However, it is desirable that we indicate our opinion on this issue. The undisputed facts were these. Hai Nguan instructed Sharp to enter into negotiations for and to make a contract of affreightment for the shipment of fertiliser from Constanza, Rumania to Indonesia. Hai Nguan, unknown to Sharp, were in turn acting on the instructions of a Mr. Hiswara of B.T. Bina Alam, an Indonesian firm. Sharp's negotiations were conducted by telexes and they sent to Hai Nguan all incoming and outgoing telexes as soon as they were sent or received.

Sharp's case at the trial was that they had direct instructions from Hai Nguan to name Phillips as the charterers. They had received a telex from Polfracht on 28 February 1975 to "state charterers full name" Windt took telephonic instructions from Hai Nguan and was told to say the charterers are Phillips Petroleum International Inc. Singapore and he noted this in

his copy of the telex from Polfracht. He then in his telexed reply dated 28 January 1975 to Polfracht stated: "Charterers Phillips Petroleum International Inc. Singapore.''

The next day Sharp received a telex from Polfracht which started as follows:

> Below owners full counter (still subject approval charterers name) firm reply to-day here 16.30 Sydney time.
>
> ...

Sharp then asked Hai Nguan for instructions on the owners full counter offer and received instructions in the form of a letter dated 29 January 1975 from Hai Nguan the relevant portion of which reads:

> With reference to owners telex dated 29 January 1975 11.00 a.m. we counter offer subject to the following terms and conditions:
>
> Charterer's Party: Phillips Petroleum International Inc. Singapore on behalf of P.T. Bina Alam, Jakarta, Indonesia.
>
> ...

On receipt of this letter Sharp telexed Polfracht on 30 January 1975 as follows:

> Attention Mr. Lysakowski. Yours 28 Charterers counter as follows:
>
> (1) Charterers: Phillips Petroleum International Inc. Singapore on behalf of P.T. Bina Alam, Jakarta, Indonesia.
>
> (2) ...

Up to that stage there can be no doubt that Sharp had acted on the express instructions of Hai Nguan as to who were to be the charterers and they followed strictly Hai Nguan's instructions. Polfracht then sent a telex on 31 January 1975 because of the ambiguity resulting from Sharp's two earlier telexes. They asked:

> Who are the charterers in the contract charterparty Phillips Petroleum International Inc. or P.T. Bina Alam Jakarta.

To this Sharp replied on 1 February 1975 as follows:

> As advised previously charterers signing charterparty are Phillips Petroleum International Inc. We explained yesterday who Bina Alam are.

Sharp's case is that they said this on the express instructions of Hai Nguan but this is denied by Hai Nguan. It is to be observed that Sharp's telex also contained replies to other questions raised by Polfracht. In our opinion it would have been inconceivable, having regard to the manner in which Sharp took instructions from Hai Nguan throughout every stage of the negotiations that Sharp's telexed reply of 1 February 1975 was not in accordance with Hai Nguan's express instructions.

The learned Judge in his judgment found that "it is more probable than not that (Sharp's reply) was sent ... without the authority of (Hai Nguan)". With respect we disagree and in our opinion the probabilities are the other way. Hai Nguan had copies of all incoming and outgoing telexes. They never corrected Sharp if in fact Sharp had not sought their instructions before saying to Polfracht that Phillips would be the charterers. They, not Sharp, arranged for the meeting to be held at Phillips' offices on 8 February 1975 for the signing of the charterparty.

Even if Sharp had replied without taking express instructions from Hai Nguan they were entitled to reply as they did as Hai Nguan had earlier expressly instructed them that the charterers were Phillips. In any event we are of the opinion that Hai Nguan, having regard to the course of dealings between them, had implicitly ratified Sharp's reply that Phillips are the charterers signing the charterparty.

We will hear the parties on the question of costs arising out of the Third Party proceedings.

Also found at [1982] CLJ 21